No. 10383

# In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

THOMPSON PRODUCTS, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## SUPPLEMENTARY MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

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## SUPPLEMENTARY MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

This Memorandum is submitted in accordance with the instructions of this Court at the oral argument in the above case held on November 1, 1943. We discuss two points herein: (1) Whether the Board's appropriation act for the current fiscal year requires dismissal of the petition for enforcement; and (2) whether certain of the acts of interference, restraint, and coercion engaged in by respondent were constitutionally privileged as an exercise of the right of free speech.

### I.

### The National Labor Relations Board Appropriation Act of 1944 does not require dismissal of the Board's petition for enforcement

In its brief (pp. 4–10) and in argument before this Court, respondent contended that the Board's petition

for enforcement must be dismissed because a proviso attached to the Board's appropriation for the fiscal year ending June 30, 1944, allegedly precludes the Board's use of any of its funds in this proceeding. The proviso reads as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed * * * (Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, Public Law No. 135, 78th Congress, 1st Session).

At the outset it should be noted that under no circumstances could respondent be entitled to a *dismissal* of this *proceeding* because of the proviso. The most that it may ask is an order forbidding the Board from using its funds to finance the proceeding. Nothing in the proviso prevents a determination of the instant case with the Department of Justice, for example, representing the Board. The narrow issue is, therefore, whether this Court should deny the Board's right to represent itself herein, and thereby overrule a decision of the Comptroller General which, as we show below, establishes that right.

The Board submits that no such result should be reached by this Court because:

A. The proviso does not amend the National Labor Relations Act.

B. The proviso does not preclude the Board's use of its funds in the instant proceeding. As the Comptrol-

ler General of the United States has ruled, the term "complaint case" as used in the proviso does not refer to enforcement proceedings in the courts.

C. The Board's use of its funds is not subject to judicial review.

D. Respondent may not challenge the Board's use of its funds in connection with the instant proceeding.

Since passage of the Appropriation Act, several efforts similar to that of respondent here have been made to preclude the Board from seeking enforcement of its orders. All of the decisions so far announced by the Courts have been favorable to the Board. *N. L. R. B.* v. *Cowell Portland Cement Co.,* Case No. 10374 (C. C. A. 9), motion denied from the bench, September 7, 1943; *N. L. R. B.* v. *Baltimore Transit Co.,* Case No. 5103 (C. C. A. 4), motion denied, October 5, 1943, see 13 L. R. R. 165–166; *N. L. R. B.* v. *Elvine Knitting Mills, Inc.*, Case No. 14 (C. C. A. 2), motion denied in *per curiam* opinion, October 26, 1943, 13 L. R. R. 281. The last-named case is the only one in which the Court deemed it desirable to set forth the grounds of its action, stating:

> In a supplemental brief respondent asserted that the Board's petition was barred by reason of a statute passed after the petition was filed in this court. Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, c. 221, Public No. 135, Tit. IV, 78th Cong., 1st Sess., providing: "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor

which has been in existence for three months or longer without complaint being filed." The Board quotes a ruling which it has received from the Comptroller General that this restriction does not apply to a case such as this already in the appellate court, and it further asserts that the present is properly not a case involving a labor agreement of the kind described in the statute. More broadly still it asserts that such a claim is not within our powers of review, under § 10 (e) of the Act, or one that respondent may raise, under *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478–480, 58 S. Ct. 300, 82 L. Ed. 374, and other cases—contentions which we understand respondent substantially conceded at the argument and with which we agree.

A

**The proviso does not amend the National Labor Relations Act**

In determining whether or not the proviso to the Appropriation Act amends the National Labor Relations Act, the decisive factor is the intent of Congress. *U. S.* v. *Mitchell,* 109 U. S. 146, 150. That is the rule which was applied in *U. S.* v. *Dickerson,* 310 U. S. 554, on which respondent relies to show that the Act has been amended. Thus, after holding that Congress can amend or repeal substantive legislation "by an amendment to an appropriation bill, or otherwise" (*id.,* at 555), the Court went on to note that "the question remains whether it did so" (*id.,* at 556).

The *Dickerson* case is not controlling here since the history of the legislation there involved left little

room for doubt as to the Congressional intent. A 1922 statute had provided for the payment of certain re-enlistment bonuses. Appropriation acts for the fiscal years ending in 1934, 1935, 1936, and 1937 had banned payments under this provision in language which concededly disclosed Congress' intent to *suspend* the operation of the 1922 Act for those fiscal years.[1] The appropriation acts for the 1938 and 1939 fiscal years also banned payments under the 1922 Act, but they used different language to accomplish this purpose, language which did not on its face show an intent to suspend or modify the 1922 Act.[2] The Supreme Court examined the legislative history of the 1938 and 1939 appropriation acts (310 U. S., at pp. 556–561)[3] and concluded that "Congress intended the legislation * * * [for] 1938 and 1939 as *a continuation of the suspension* enacted in each of the four preceding years" (*id.*, at p. 561) [italics supplied].

[1] The provision of the 1934 Act read as follows: "So much of Sections 9 and 10 of the Act * * * *is hereby suspended* as to re-enlistments made during the fiscal year ending June 30, 1934." [Italics supplied.]

[2] The 1938 Act read as follows: "No part of any appropriation contained in this or any other Act for the fiscal year ending June 20, 1938, shall be available for the payment of re-enlistment allowances * * * notwithstanding the applicable provisions of Sections 9 and 10 of the Act" of 1922.

[3] Thus it noted that the amendment was viewed by Congress as a "further suspension" of the bonus (310 U. S., at p. 558) and that, when the 1938 appropriations were being considered in the House of Representatives, repeated points of order that the proposed rider constituted substantive legislation were conceded to be valid by proponents of the rider and were sustained (*id.*, at p. 559).

An intent on the part of Congress to amend earlier legislation may also be revealed by the express langauge of subsequent appropriation acts. Thus, in *U. S.* v. *Perry,* 50 Fed. 743 (C. C. A. 8), and *U. S.* v. *Aldrich,* 58 Fed. 688, 689 (C. C. A. 1), an earlier appropriation act barring the use of the money appropriated in that Act for the payment of certain per diem allowances had been succeeded by an appropriation act which provided that "*hereafter* no part of the appropriations made * * * shall be used * * * [for certain purposes] * * * nor shall any part of *any* money appropriated be used * * * [for the per diem allowances in question]" [italics supplied]. It was held in both cases that the later appropriation act was a substantive amendment, but in the *Aldrich* case, it was further held that the earlier act was "not a prohibition of a per diem, but extend[ed] merely to that appropriation; so that the legal right to the per diem remained the same as though the Act had not been passed * * *." See also *Swift* v. *U. S.,* 128 Fed. 763 767–768 (C. C., D. Mass.), affirmed on other grounds 139 Fed. 225 (C. C. A. 1).

It is not without significance that in all of the cases which we have found, in which it has been held that a statute has been amended by an appropriation act rider, the statute affected was pecuniary in nature and therefore pecularily subject to repeal or amendment by the withholding of funds. We have found no case in which remedial social legislation creating substan-

tial rights has been deemed to be repealed by the withholding of funds for a single year.

We submit that in view of the presumption against repeal by implication,[4] it should not be held that the Act has been set aside in part in the absence of a clear showing of legislative intent. As we shall now demonstrate, no such showing can be made here.

It is manifest that the rider is not substantive legislation but merely constitutes a temporary limitation upon use of the Board's current appropriation.[5]

It is generally acknowledged, as respondent concedes (Resp. Brief, pp. 5, 7, 10), that the real purpose of the proviso was to prevent the Board from procceeding to a decision and order in the *Kaiser* cases, then pending before it (App. A, pp. 3–6).[6] The legislative history of the proviso plainly indicates that in achieving that result, the proponents of the limitation did not intend to affect the Board's statutory authority, nor to make any substantive alteration in the Act. Thus Congressman Hare, who originally introduced the rider in the House (89 *Cong. Record,* 78th Cong., 1st Sess., pp. 6046–6047), stated flatly, "there is no attempt to amend the National Labor Relations Act" (*id.,* p.

[4] *U. S.* v. *Borden Co.*, 308 U. S. 188, 198–199; *U. S.* v. *Jackson*, 302 U. S. 628, 631.

[5] See IV *Hinds' Precedents of the House of Representatives* (1907), §§ 3917–3926; 3929; VII *Cannon's Precedents of the House of Representatives* (1935), §§ 1580, 1585–1594, 1638–1639, 1710.

[6] See also 89 *Cong. Record*, 78th Cong., 1st Sess., pp. 6047 (Cong. Ditter), 7025 (Cong. Norton and Anderson), 7026 (Cong. Tarver), 7104 (Sen. Reed), 7106 (Sen. Shipstead), 7108 (Sen. McCarran).

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7024). Senator McCarran, in charge of the bill in the Senate (*id.* pp. 6647, 6650), expressed a like intent on the part of that chamber.[7]

The remarks, on which respondent relies, of those "who opposed the measure" (Brief, p. 6), were at most expressions of a fear that the rider might be construed more broadly than was intended by its proponents. These fears must be treated as having been allayed by the reassurances given by the proponents. Certainly, we must look to the authors of a legislative act rather than to its opponents for an authoritative interpretation of its intent.[8] Moreover, to the extent

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[7] "* * * We do not in an appropriation bill propose to amend or alter or nullify a legislative act which has been passed by Congress and which has received Executive approval."

"* * * All members of the committee are in favor of stabilizing labor conditions, and if we could do so without destroying the Wagner Labor Relations Act, we would. At the same time, we do not want to destroy an act which has been passed by Congress after long debate and consideration."

"* * * We want to provide limitations which will be wholesome for the welfare of the country in this unhappy hour, but we do not want to vitiate the Act" (89 *Cong. Record*, 78th Cong., 1st Sess., p. 6650).

[8] Thus the Supreme Court has attached particular weight to the remarks of those legislators who, like Senator McCarran and Congressman Hare here (89 *Cong. Record*, 78th Cong., 1st Sess., pp. 6046–6047, 6647, 6650), are "in charge of a bill in course of passage." *Duplex Co.* v. *Deering*, 254 U. S. 443, 475; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463–464. See also *McClure* v. *U. S.*, 95 F. (2d) 744, 751 (C. C. A. 9), affirmed 305 U. S. 472. Thus in the *McCaughn case* the Court said:

"Nor do we think of significance the fact relied upon here and by the Court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in

that there was a conflict of views, Congress' adoption of the proviso must be treated as an acceptance of the interpretation and intent of the proponents.

The legislators' intent not to amend the Act is further shown by the fact that the rider was meant to have only a temporary effect.[9] In fact, it is apparent that if no rider is attached to the Board's appropriation for the next fiscal year, the National Labor Relations Act will remain in full force and effect. Hence, it cannot be contended that a substantive amendment has been added to the Act.

## B

### The proviso does not preclude the Board's use of its funds in the instant proceeding

The proviso clearly does not preclude the Board's use of its funds in the instant proceeding. The proviso states that the Board shall not use any of its

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charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute."

[9] "Mr. McCarran. * * * I made the statement that this provision would tend to stabilize labor relations for the duration of the war. In that statement I was in error, because this bill is an appropriation bill, which runs for only 1 year. But in the interim the Congress hopes that legislation may be enacted which will stabilize labor relations for the duration of the war" (89 *Cong. Record*, 78th Cong., 1st Sess., p. 7103).

"Mr. Hare. * * * In other words, where contracts have been in operation for 3 months or longer and no complaint has been filed with the National Labor Relations Board, the National Labor Relations Board would be relieved of the necessity of going in and taking jurisdiction any time within the next 9 months, or during the life of this appropriation. The committee feels that possibly in that time the necessity for interference may not be necessary" (*id.*, p. 6046).

funds in connection with a "complaint case * * *." At the request of the Board, and pursuant to statutory authorization (*Budget and Accounting Act,* 1921, Sec. 304; 42 Stat. 20, 24; 31 U. S. C., Sec. 74), the Comptroller General of the United States, on July 29, 1943, issued his ruling, a copy of which is attached hereto (App. A), interpreting this phrase. The Comptroller General ruled that the phrase "complaint case" as used in the proviso refers to cases in the "complaint stage" before the Board, and not to enforcement proceedings before the circuit courts of appeals, such as is the instant proceeding. Accordingly, the Comptroller General held that (App. A, pp. 14, 3–9)—

> * * * The Board is not precluded from expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.[10]

The Board's decision in the instant case was issued on December 31, 1942 (R. 49).

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[10] This is also the view of the Board as to the proper construction of the proviso. The persuasive considerations, based upon the legislative history of the proviso, the terminology used in Section 10 of the National Labor Relations Act, and other factors, upon which this view rests, are fully set forth in the Comptroller General's opinion, to which we respectfully refer the Court in this regard (App. A, pp. 3–9, 14).

In a later opinion issued on October 21, 1943, the Comptroller General ruled that the current appropriation of the Board is not available for use in connection with cases involving allegedly company-dominated unions which have had contractual relations with the employer for at least 3 months without charges being filed. The later ruling, however, applies only to cases in the "complaint stage," that is, to cases not affected by the earlier ruling of

The Comptroller General's interpretation of the proviso is binding upon the Board. It is well settled that decisions of the Comptroller General upon questions involving disbursements to be made by or under the head of an executive department or independent establishment are "conclusive upon the executive branch of the Government" (*Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 4–5 note). "Disbursing officers, or the head of any executive department * * *, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." (*Budget and Accounting Act,* 1921, Sec. 304). See also *Brunswick* v. *Elliott,* 103 F. (2d) 746, 750 (App. D. C.); 33 Ops. Att'y Gen. 268; 33 Ops. Att'y Gen. 265.[11]

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the Comptroller General. Since that earlier ruling, without more, holds the rider inapplicable to the instant case, the second ruling has no effect here except to preclude the Board from contending before this Court that the rider was not intended to apply to cases arising under Section 8 (2) of the Act.

[11] Moneys appropriated to a governmental agency by the Congress are not paid directly to the agency but are held in the U. S. Treasury to the credit of the agency. The Treasury pays over sums to the agency or its creditor only upon receipt of a voucher approved by the General Accounting Office. *Budget and Accounting Act*, 1921, Secs. 304, 305. Since the Comptroller General's ruling governs the General Accounting Office, it is clear that the ruling likewise governs the agency's power to draw upon the funds credited to it in the Treasury. See, also, Mansfield, *The Comptroller General* (1939), p. 2. Rulings of the Comptroller General have been accepted by the Supreme Court as persuasive authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 126, note 14.

C

**The Board's use of its funds is not subject to judicial review**

We have demonstrated under Point B hereof that the proviso to the Board's appropriation for the current fiscal year does not preclude the Board's use of its funds in the instant case. But even if the proviso could be regarded as applicable, we submit that it cannot constitute a defense to this proceeding because the Board's use of its funds is not subject to judicial review.

This Court was, of course, created by Congress,[12] and its "organization," its "authority," its "limited jurisdiction," and its "powers" all are received "from the legislature only."[13] Thus, any authority of this Court to review expenditures by administrative agencies must depend upon some act of Congress. However, the Congress has nowhere authorized judicial review of administrative or executive expenditures. To the contrary, Congress has clearly manifested its intention that the use of appropriations be not subject to judicial supervision. The creation of the General Accounting Office as a check upon governmental expenditures[14] has at once provided a specialized

[12] Act of March 3, 1891, 26 Stat. 826; Act of March 3, 1911, 36 Stat. 1131 *et seq.*, 28 U. S. C. §§ 211 *et seq.* (Judicial Code, sections 116 *et seq.*). See Hughes, *Federal Practice Jurisdiction & Procedure* (1931), §§ 105 *et seq.*

[13] *Chisholm* v. *Georgia*, 2 Dall. 419, 432 (U. S. 1793); *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721 (U. S. 1838); *Kempe* v. *Kennedy*, 5 Cranch 173, 185 (U. S. 1809); *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 329–331 (U. S. 1816).

[14] See discussion under Point B, *supra*.

agency to handle this complex technical matter and obviated any possibility of the courts' being burdened with the minutiae of detail indigenous to accounting. Congress' intention that the use of appropriations be subject to legislative rather than judicial control is further emphasized by the fact that Congress has reserved to itself the final review of executive and administrative expenditures. Thus, the Comptroller General is required to report to Congress every expenditure or contract made by any department or establishment in any year in violation of law (*Budget and Accounting Act,* 1921, Sec. 312 (c)). As the congressional scheme contemplates, the proper use of appropriations has remained exclusively a matter between Congress, the Comptroller General, and the agency involved. Consequently, the propriety of expenditures made pursuant to valid appropriations has not been made the subject of judicial cognizance.

Nor does this Court's jurisdiction over the case at bar, under the National Labor Relations Act, authorize review of the Board's use of its funds. The instant proceeding is, of course, a purely statutory one, under Section 10 (e) of the Act, to enforce the Board's order. It is well settled that this Court derives its "jurisdiction to act" therein solely from the Act (*N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 209), and has power to review the Board's order only "in the respects indicated by the Act" (*Matter of National Labor Relations Board,* 304 U. S. 486, 492–494). "Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the [Circuit]

Courts of Appeals *as the Act sets out.*" [Italics added.] (*National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 342.) [15]

It seems too clear for argument that this Court is not, and may not be, concerned in enforcement proceedings under the Act, with questions as to the propriety of the Board's expenditure of funds appropriated to its use by the Congress. As the Supreme Court has stated (*N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 342)—

> If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the [Circuit] Court of Appeals requires the Court to grant enforcement of the Board's order.

It is clear that under the statutory scheme, the Court is concerned with the matters of substance to which reference is made in the Supreme Court's opinion quoted above, and not with such wholly unrelated and collateral matters as the availability of Board funds. As well might the Court be requested to refuse enforcement of a proper Board order because the attorney who appeared for the Board in this Court had allegedly been improperly classified at the time

[15] See also, *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, 407–409; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597.

of his employment and hence compensated at an improper rate under existing civil-service law. Yet no one would suggest that an employer might, in enforcement or review proceedings under the Act, divert the energies of the Court and the Board to such matters.

As we have noted (Point A, *supra*), these principles and the established procedure for review of Board expenditures were not changed by the proviso to the Board's appropriation for the current fiscal year. The proviso merely prescribes certain limitations upon the Board's use of its funds during this period, but leaves intact the substantive provisions of the Act including, of course, the provisions under which the Board and this Court have power to act.

In view of the foregoing considerations, judicial review of the propriety of expenditures by the Board in enforcement proceedings would do violence to the doctrine of the separation of powers.[16] With due regard for the authority of "another and co-equal department" (*Massachusetts* v. *Mellon,* 262 U. S. 447, 488–489), the courts will not burden themselves with such matters. Like political questions, such internal financial matters would impose upon the court the duty of rendering a decision in spite of "the lack of satisfactory criteria for a judicial determination" (*Coleman* v. *Miller,* 307 U. S. 433, 454–455).

[16] While there is some doubt and conflict concerning the *raison d'être* of the doctrine of the separation of powers in our American jurisprudence, it is axiomatic that the doctrine is an integral part of our constitutional scheme. (See Frank, *When 'Omer Smote 'is Bloomin' Lyre*, 51 Yale L. J. 367–381 (1942), included in Frank, *If Men were Angels* (1942), pp. 223–235, discussing the conflicting theories advanced.)

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The sole question raised by respondent's request that the petition for enforcement be dismissed is whether the Board is making proper use of the funds appropriated for it by the Congress. It is patent that this raises a question exclusively within the province of the legislative department and therefore not subject to judicial scrutiny. The Congress has appropriated money for the Board's use during the fiscal year. The amount of such appropriation is a matter vested in the legislature and not cognizable by the courts. Nor is the use the Board makes of its funds a topic of judicial concern, regardless of the existence of a proviso specifying certain limitations upon the use of the appropriation. The problem is the same, and there is not a justiciable controversy, whether respondent asserts that funds are misused or, for example, claims that the appropriation has been exhausted and there are no funds with which the Board can prosecute the proceedings at bar. Such assertions are as irrelevant as a contention that a party cannot maintain a suit because of an alleged inability to pay costs or the alleged theft of the funds being used to maintain suit.

D

**Respondent may not challenge the Board's use of its funds in connection with the instant proceeding**

Finally, respondent has no standing to challenge the Board's use of its funds in connection with the instant proceeding. It is well settled that a Federal expenditure—even though (unlike that in the instant case) palpably unauthorized or illegal—may

not successfully be challenged by a litigant, in the absence of a showing of "direct injury" not suffered by the public at large, attributable to the unauthorized expenditure. (*Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–480; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485, 490, aff'g 91 F. (2d) 665, 676 (C. C. A. 4); *Massachusetts* v. *Mellon,* 262 U. S. 447, 480–485, 486–488; *Fairchild* v. *Hughes,* 258 U. S. 126, 129–130; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137–140. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125, 129, 131–132. See Note, 51 Harvard Law Review 897, 899–904 (1938).)[17] The term "direct injury" as used in these cases is "used in its legal sense, as meaning a wrong which directly results in the violation of a legal right" (*Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479).

Respondent's position in the instant proceeding is not such as to expose it directly to "violation of a legal right" as a result of the Board's expenditure of its funds to secure enforcement of its order. Respondent has violated the law as enacted in the National Labor Relations Act, and has been ordered by the Board, as the agency charged with administration of the Act, to cease its unlawful conduct and to take certain affirmative action to remedy the consequences

[17] This rule too rests, at least in part, upon the doctrine of the separation of powers. In recognition of the limitations upon its authority inherent in the constitutional separation of powers, the judicial department has enunciated certain rules of self-limitation. One of these is that a court will decline to review a legislative or executive act unless the party seeking such review has sufficient interest to challenge the action.

of its wrongful activities. Respondent has refused to comply with this order. All of this occurred prior to passage by Congress of the proviso to the Board's appropriation for the current fiscal year. The only damage respondent will incur by the Board's expenditure of its funds to secure compliance with its order is that it may be compelled to comply with that order and obey the law, which the public generally is likewise required to obey. Compulsion to obey a valid and lawful order, issued under a valid and existing law, may not possibly be regarded as violation of any "legal right" of respondent which the law will recognize (*Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485, 490, aff'g 91 F. (2d) 665, 676–677 (C. C. A. 4); *Williams* v. *Riley,* 280 U. S. 78, 80; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137–140; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125, 129, 131–132; *Central Illinois Public Service Co.* v. *Bushnell, Ill.,* 109 F. (2d) 26, 29 (C. C. A. 7); *O'Brien* v. *Carney,* 6 F. Supp. 761, 762 (D. C. Mass.)). Respondent obviously has no "legal right" to immunity from the Act, which the public at large is required to obey.

## II

**Respondent's acts of interference, restraint, and coercion were not constitutionally privileged**

Respondent contends that the utterances of its officers and supervisors and the articles published in its house organ, *Friendly Forum,* on which the Board based findings of interference, restraint and coercion,

were constitutionally privileged under *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; and *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), cert. denied on October 18, 1943. Two important factors distinguish those cases from that at bar: (1) respondent's conduct here included express threats of economic reprisal; and (2) respondent's coercive activities formed a part of a course of conduct which included violations of the Act to which the claim of constitutional privilege cannot possibly be applied.

1. The expressly coercive nature of most of respondent's conduct cannot be questioned. The warnings that union organization would result in closing of the plant, originally expressed by Director of Personnel Livingstone and thereafter repeated to the employees by lesser supervisors (Board's main brief, pp. 5–6, 15), were in no sense expressions of opinion. Neither was the threat that "when you put that C. I. O. button on you are hanging out your neck. Somebody will take a crack at it" (Board's main brief, p. 16).

No such threats were involved in the *Virginia Electric* case; in fact, the Supreme Court expressly noted that:

> In determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways (314 U. S., at p. 477).

Similarly, the decision in the *American Tube* case rested expressly on the fact that the expressions of

employer preference there voiced contained "no intimation of reprisal against those who thought otherwise; quite the opposite" (134 F. (2d), at page 995).

Conversely the circuit courts have repeatedly held, in cases arising after the *Virginia Electric* decision, that where an "intimation of reprisal" does appear, constitutional privilege may not be claimed. In two of these cases the Supreme Court refused to review decisions favorable to the Board on the same day that it refused to grant review in the *American Tube* case. *N. L. R. B.* v. *William Davies Company,* 135 F. (2d) 179 (C. C. A. 7); *N. L. R. B.* v. *Trojan Powder Company,* 135 F. (2d) 337 (C. C. A. 3). In the *Trojan Powder* case, the Court noted that the series of statements in issue "lack[ed] the venom found in many other cases" and that there was "no threat explicit in the language used" (135 F. (2d) at p. 339). It concluded, however, that a threat could be spelled out of the statements, and upheld the Board's finding and order. Similarly, in the *Davies* case, the Court pointed out that "the circumstances are not numerous or particularly flagrant" (135 F. (2d) at p. 181) but held that:

> The slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute constitutes an unfair labor practice in violation of Section 8 (1) of the Act (135 F. (2d), at p. 181).

Finally, in *N. L. R. B.* v. *Crown Can Co.,* 13 L. R. R. 283, decided by the Circuit Court of Appeals for the Eighth Circuit, on October 25, 1943, one week after

the Supreme Court denied the petitions for writ of certiorari in the *American Tube, Davies,* and *Trojan Powder* cases, the Court held that threats to close a plant were not within the protection of the Constitution, saying:

> "Free speech" does not mean license to violate valid laws, such as laws against perjury, libel, slander, or laws against restraint or coercion of employees in the exercise of their rights under the Act.[18]

2. The long course of unfair labor practices engaged in by respondent here also serves to distinguish the *American Tube* case. There, the record contained nothing but "the letter and the speech [of the employer] together with the occasion—a coming election—on which they were uttered" (134 F. (2d) at p. 995). The importance of considering the record as a whole is clearly revealed by the *Virginia Electric* case. There the Court held that "it does not appear that the Board raised [the utterances] to the stature of coercion by reliance on the surrounding circumstances." It further concluded that "if the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone" (314 U. S., at p. 479). After reconsideration of the entire case by the Board, its findings were upheld by the Court because "while the bulletin * * * and the speeches * * * are still stressed, they are considered not in isolation but

[18] See also *N. L. R. B.* v. *Van Deusen*, decided November 4, 1943, 13 L. R. R. 321, 322 (C. C. A. 2).

as a part of a pattern of events adding up to the conclusion of domination and interference" (*Virginia Electric & Power Company* v. *N. L. R. B.*, 319 U. S. 533, at 539). The record in the instant case makes it clear that the Board's findings are grounded upon respondent's whole course of conduct, and that the coercive statements of respondent's officers and supervisors are viewed, not in isolation, but in relation to the whole complex of respondent's course of interference, restraint, and coercion. Thus, in summing up its findings as to the unfair labor practices, the Board listed together the management's threats to close the plant if the Union were organized, inquiries as to union membership among employees, the employment of Porter to engage in espionage, and the distribution of antiunion articles in *Friendly Forum*, as constituting restraint, interference, and coercion (R. 73).

Respectfully submitted.

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DECEMBER 1943.

## APPENDIX A

COMPTROLLER GENERAL OF THE UNITED STATES,

*Washington 25, July 29, 1943.*

B–35803

Chairman,

NATIONAL LABOR RELATIONS BOARD.

MY DEAR MR. MILLIS:

I have your letter, without date, received in this office July 20, 1943, reading as follows:

> The Act making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies for the fiscal year ending June 30, 1944 (Public 78th Congress) contains the following provision:
>
> "No part of the funds appropriated in this title shall be used in any way in connection with a. complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested persons."
>
> The National Labor Relations Board requests the decision of the Comptroller General concern-

ing two questions which arise from the above-quoted language:

1. Does the phrase "without complaint being filed" refer to "charges" filed pursuant to Section 10 (b) of the National Labor Relations Act, or does the phrase refer to "complaint" issued by the Board pursuant to Section 10 (b)?

Reference to Section 10 (b) of the National Labor Relations Act will show that when a charge has been filed alleging that any person has engaged in or is engaging in an unfair labor practice, the Board has power to issue and cause to be served upon such person a complaint stating the charges. In the normal case, when a charge alleging unfair labor practices is lodged with a Regional Office of the Board, an investigation is instituted to determine whether the facts appear to justify issuance of a complaint, and whether the Board has jurisdiction to proceed further in the matter. The purposes of such an investigation require that the case be assigned to an agent, that conferences be held with the parties, and that facts be ascertained in order to enable the responsible officials of the Board to decide whether a complaint should be issued. The ambiguity in the phrase quoted in the first question presented for your consideration arises out of the fact that charges are *filed* by any person desiring to call to the attention of the Board the alleged commission of an unfair labor practice, whereas, complaints are *issued* by the Board after an investigation of the charges.

The purpose of the amendment, as well as its legislative history, indicates that the intention of Congress was to limit the use of funds to cases in which *charges* had been filed within three months of execution of a labor agreement. This is made clear by the following statement of Congressman Hare, who introduced this amendment to the Appropriation Act:

"Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no *formal complaint filed by the employees,* N. L. R. B. would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires." [Italics supplied.] (Cong. Record, 78th Congress, 1st Session; Wednesday, June 16, 1943, p. 6047.)

Senator Brewster, in explaining the amendment on the floor of the Senate, likewise made clear the intent of the rider in the following language:

"I think it should be clear that the complaint to which the amendment refers will be filed by the labor organization" (Cong. Record, 78th Congress, 1st Session, Saturday, June 26, 1943, p. 6648).

The Board desires your opinion whether the Board's understanding is correct that the three-month limitation applies to cases in which a charge has not been filed in the requisite period.

2. Is the phrase "complaint case arising over an agreement" to be construed to prohibit the use of funds in connection with cases which, prior to July 1, 1943, had been decided by the Board?

The view of the Board is that a "complaint case" refers to a case "in the complaint stage," i. e., in the stage preceding the issuance of a Board decision and order. Any other construction would be in conflict with the legislative history of the amendment and with the provisions of the National Labor Relations Act relating to enforcement and review of Board orders.

A. Legislative History.

The legislative history of the amendment shows that its purpose is to prevent the Board from proceeding to a decision and order in the cases pending before the Board and known

upon the records of the Board as *Matter of Oregon Shipbuilding Corporation and Industrial Union of Marine and Shipbuilding Workers of America; Matter of Oregon Shipbuilding Corporation* and *William King, an individual;* and *Matter of Kaiser Company, Inc.,* and *Industrial Union of Marine and Shipbuilding Workers of America, et al.;* Cases Nos. XIX–C–997; XIX–C–1055; XIX–C–1101. These cases are popularly known as the "Kaiser Shipbuilding Cases," and involve complaints based upon charges that the respondent corporations had discriminatorily discharged certain employees pursuant to closed-shop contracts which were alleged to have been invalid, hence not a defense to the charges of discrimination.

The amendment to the Appropriations Act was urged at the Hearings on the Labor-Federal Security Appropriation 1944, before the Subcommittees of the Committees on Appropriations of the House of Representatives and of the Senate, by John P. Frey, President, Metal Trades Department, American Federation of Labor. Mr. Frey, who represented the A. F. of L. Unions, which were the beneficiaries of the allegedly illegal contracts with the Kaiser companies, proposed the amendment which, in his words, "would make it impossible to do what is being done in the *Kaiser case* and those which we know are to follow." (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., on the Department of Labor-Federal Security Agency Appropriation Bill for 1944, Part 1, page 427.)

Mr. Frey's testimony before the Senate Subcommittee reveals that the sole purpose of the amendment was to prevent the Board from deciding the *Kaiser cases* and from proceeding in the future to issue complaints in similar cases. (Hearings, pp. 322–346.) Thus, Mr. Frey stated:

"If I may be permitted to say this, the problem presented in this case (*Kaiser cases*) and in the action of the National Labor Relations Board is without precedent. * * * (p. 334.)

"It (the amendment) would prevent the raiding which is now going on and which would cease instantly throughout the country if the N. L. R. B. would *cease hearing these complaint cases* involving trade-union agreements with employers. [Italics supplied.] (p. 343.)

"The case that has attracted the most attention is the *Kaiser case*. The C. I. O. has prepared complaint cases of a similar nature against two yards in San Francisco, three of the yards in Los Angeles, three of the yards on the Gulf, four of the yards in Florida, and three in the South Atlantic region. Now, it is the intention, if this *Kaiser case* proceeds to go down the line, to have a repetition of what we have gone through in turmoil and friction in the other shipyards. * * * The *Kaiser case* is symptomatic of the danger that exists" (pp. 344–345).

The debates on the floor of both Houses show unmistakably that the purpose of the amendment was to prevent the Board from deciding the *Kaiser cases* and from issuing complaints during the 1944 fiscal year in similar cases.

The following excerpts from the debates reveal this intention:

1. It (the amendment) merely applies to the agreement in existence at the time, worked out between the A. F. of L. and other labor groups and management, in the Pacific coast yards (Sen. Bridges, Cong. Rec., 78th Cong., 1st Sess., p. 6648).

2. Mr. Kaiser cooperated completely with the suggestion of the Government that there be the closed shop, although it was not put into the stabilization agreement. This amendment merely says that the agreements entered into in

that fashion shall not now be reopened (Sen. Brewster, id., p. 6648).

3. Now, one thing is clearly apparent, and that is that this threatened interposition of the N. L. R. B. in the affairs of the two Kaiser shipyards in question is almost certain to bring about very material interruption in the very fine record being made by those yards in the building of ships for the war effort. This is not a permanent amendment to the National Labor Relations Act. This is an emergency measure. It is only to be effective for the 12 months that this appropriation bill is effective, and it is intended to prevent during those 12 months the interruption of production in those two shipyards or in any other plants which are similarly situated * * * (Congressman Tarver, Chairman of Approp. Committee, Cong. Rec., 78th Cong., 1st Sess., p. 7026).

4. I have no hesitancy in saying that this amendment represents the position of the American Federation of Labor. Its representative came before our committee and clearly made its position known. There should be no misunderstanding about that at all. There is no doubt in my mind but what it was precipitated by the situation that exists out in the Kaiser yard (Cong. Keefe, Cong. Rec., 78th Cong., 1st Sess., p. 7026).

5. We heard all sides of the controversy, and this amendment is merely the result of the desire on the part of the American Federation of Labor on the west coast to maintain an agreement which was entered into by a very small number of men employed in the plant of Mr. Kaiser (Sen. Truman, Cong. Rec., 78th Cong., 1st Sess., p. 7103).

It is therefore apparent from the legislative history of the amendment that it was not intended to preclude the Board from proceeding during the fiscal year 1944 to obtain court enforcement of any order issued by the Board prior to July 1, 1944 [1943].

B. Provisions of the National Labor Relations Act.

This intention is likewise confirmed by the provisions of the National Labor Relations Act which draw a distinction between a "complaint" (when a case is before the Board up to the time of the making of its order) and a "proceeding" to review or enforce a Board order (which occurs subsequent to Board order). Thus, Sections 10 (a), (b), and (c) described the method of instituting a case before the Board. Reference to the language of these sections reveals that upon the filing of a charge of the commission of an unfair labor practice, the Board may issue a *complaint* and serve it upon the appropriate parties. Provision is made for the amendment of such a *complaint,* for the filing of an answer to such a *complaint,* for a hearing thereon, and for the making of an order sustaining or dismissing such a *complaint.* After that point of Board decision and issuance of an order, the statute adopts entirely different language in reference to *proceedings* to be had before appropriate reviewing courts. Thus, in Sections 10 (e), (f), and (g)—prescribing procedures before the courts subsequent to Board order—repeated reference is found to such proceedings. In Section 10 (e) it is provided that, "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction *of the proceeding.* * * *" In Section 10 (g) it is provided that, "The commencement *of proceedings* under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

For these reasons it appears clear that when a petition for enforcement or review of a Board order is filed in a Circuit Court of Appeals, the case is not a "complaint case," *i. e.,* a case before the Board, but is an "enforcement case," *i. e.,* a case exclusively within the jurisdiction

of the Court. As the Board described it in its Statement to the Appropriations Committee: "At this point the case belongs to the court" (House Hearings, p. 316).

Moreover, after court decision and decree, the only means of enforcing Board orders is through the utilization of the inherent power of the courts to make their decrees effective. Only the National Labor Relations Board has power to invoke this power through the filing of contempt proceedings in the courts. *Amalgamated Utility Workers* v. *Consolidated Edison Company,* 309 U. S. 261, 269. Such a proceeding is of course in no sense "a complaint case," but, like other action subsequent to Board order, a strictly judicial proceeding.

It is to be noted in this connection that the National Labor Relations Act expressly vests in Board attorneys the right to "appear for and represent the Board in any case in court." (Act, Sec. 4 (a).) Pursuant to this provision, the litigation of the Board has been and is conducted by staff attorneys under the direction of the Board's General Counsel. Congress was aware of the statutory provision and of the Board's practice: a description of the Board's practice in this respect was given to the Appropriations Subcommittees of both Houses in the Hearings on the 1944 Appropriations Act (Hearings before Senate Subcommittee, p. 295; Hearings before House Subcommittee, p. 355).

It would appear to follow that as to those cases which had been decided by the Board and which were pending in the courts at the beginning of the fiscal year, the courts have exclusive jurisdiction and the Board is not deterred by the amendment from taking such action in the court proceedings as is required by the statute and by the rules of court.

In summary, it is the view of the Board that the amendment was not intended to prohibit, and should not be construed as prohibiting, the

Board from proceeding to litigate in the courts any cases in which the Board has issued its decision and order. We are transmitting herewith copies of the National Labor Relations Act and the Hearings and Debates relating to the amendment. The Committee Reports on the Appropriations Act contain no reference to the amendment, which was introduced in Congress after the respective Committees had submitted their Reports.

Section 10 (b) of the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, which represents basic legislation establishing the jurisdiction of the National Labor Relations Board, provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

So far as your first question is concerned, since the obvious purpose of the statutory provision contained in the Labor-Federal Security Appropriation Act, 1944, approved July 12, 1943, Public Law 135, quoted in your letter, is to curtail to a certain extent the statutory jurisdiction of the National Labor Relations Board, it would seem necessary, in the absence of indicia of a contrary intention, that the word "complaint" contained therein be construed in the light of the meaning of that word as it appears in the act of July 5, 1935, *supra.* It is clear that the "complaint" in the latter act has reference to an action instituted by the Board, and would appear to be similar to a declaration in a suit at common law. But, as you point out in your letter, such a complaint is *issued* by the Board after charges of unfair labor practices are *filed* by any person desiring to call the matter to the attention of the Board. Hence, there is room for doubt as to whether in employing the term "without complaint being filed" in the act of July 12, 1943, the Congress had reference to the complaint *issued* by the Board or the charges *filed* with the Board under the provisions of the act of July 5, 1935.

Under these circumstances, there appears justified a reference to the legislative history of the provision in question, particularly to the debates and the hearings before the Congressional committees involved, in order to determine the legislative intent. See *Blake* v. *National Banks,* 23 Wall. 307; *United States* v. *Dickerson,* 310 U. S. 554; *United States* v. *American Trucking Association,* 310 U. S. 534. In the last cited decision, wherein the Supreme Court of the United States referred to the debates on the floor of the Senate and the Congressional committee reports as aids in construction of the statute, the court said:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words

by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * *

The portions of the debates on the provision in question quoted in your letter show clearly that the members who sponsored the provision regarded the term "complaint" as the charges which are filed by employees or management with the Board. In addition thereto, an examination of the debates on the measure discloses the following statements:

Mr. HARE. * * *

The committee feels that we can relieve this Board of some of its duties and responsibilities by placing a limitation on the appropriation which would relieve the Board of the necessity of having to consider complaint cases arising on agreements between management and labor where the agreements have been in existence for 3 months or longer. In order words, where contracts have been in operation for 3 months or longer and *no complaint has been filed with the National Labor Relations Board* the National Labor Relations Board would be relieved of the necessity of going in and taking jurisdiction any time within the next 9 months, or during the

life of this appropriation. * * * [Italics supplied.] (Cong. Record, June 16, 1943, page 6046.)

Mr. WHITTINGTON. I should like to ask the gentleman from South Carolina if any of the funds appropriated here are used by that Board to investigate cases where management and labor are undertaking to reach an amicable agreement, so that both will have a voice in the management and operation of the affairs of the company? What do the hearings disclose with reference to that?

Mr. HARE. I am not sure that I understand the gentleman's question.

Mr. WHITTINGTON. Whether the Board is expending public funds to investigate cases where management and labor are trying to get together in the solution of their problems?

Mr. HARE. *Not unless either management or labor has filed a request* with the board to assist in that effort.

Mr. WHITTINGTON. *And unless that request is filed within 3 months no part of these funds will be available.*

Mr. HARE. *That is correct.* [Italics supplied.] (Cong. Record, June 16, 1943, page 6047.)

Mr. HARE. If a contract has been in force for 3 months and the individual has been satisfied with it for 3 months he will have notice of it all of this time. If he has been satisfied with it for 3 months and someone comes along and makes him dissatisfied, then he is estopped for the next 9 months *from filing a complaint and being considered by the National Labor Relations Board.*

* * * * *

Mr. HARE. That is right. *If he acquiesces in it for 3 months and makes no complaint,* the idea is that he is satisfied. He has had plenty of time to consider it, plenty of time to deliber-

> ate. If somebody comes along and makes him dissatisfied after that, then he is stopped from expressing his dissatisfaction. * * * [Italics supplied.] (Cong. Record, July 1, 1943, page 7024.)

The foregoing would appear to demonstrate clearly that the term "complaint" was used by the Congress in the sense of an assertion of a grievance by labor or management with respect to unfair labor practices. In that connection, it appears from your submission that under the existing procedure of the Board when a charge is filed alleging unfair labor practices, a preliminary investigation is undertaken to determine the propriety of issuing a complaint. It is understood that such investigation often discloses that the charges are unfounded and, in many instances, affords an opportunity to the parties involved for the amicable adjustment of the issues, thus obviating the necessity for the issuance of a complaint by the Board. If it were held that the provision here involved refers to the complaint issued by the Board, it is apparent that in many cases the Board would be confronted with the necessity of establishing charges which it has had no opportunity to investigate. I find nothing in the legislative history of the measure which evinces a Congressional purpose to regulate the established procedure of the Board in that respect. Accordingly, I agree with your view that the provision in question limits the use of funds to those cases in which charges have been filed with the Board within three months of the execution of a labor agreement, but prescribes no limitation as to the time within which a complaint may be issued by the Board.

With respect to your second question regarding the scope of the term "complaint case" appearing in the provision here involved, for the reasons stated in

your submission it is deemed proper to conclude that the Board is not precluded from expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.

The enclosures transmitted with your letter are returned herewith.

Respectfully,

[S] LINDSAY C. WARREN,
*Comptroller General of the United States.*

Enclosures.

U. S. GOVERNMENT PRINTING OFFICE: 1943